WONG KIEN CHING v. SENG KIM HUAT & ANOR

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
MARY LIM JCA
YAACOB MD SAM JCA
[CIVIL APPEAL NO: S-02(IM)-1943-09-2017]
17 DECEMBER 2018

COMPANY LAW: *Winding up – Injunctions – Application for orders under s. 368A(1) and (4) of Companies Act 1965 – Compelling appellant to deliver to official receiver or liquidators issue documents of title pertaining to native titles and subleases – Whether application fell within terms of s. 368A – Whether respondents/petitioners entitled to utilise s. 368A for purpose of wrenching titles from appellant – Whether petitioners' interests affected by conduct of appellant – Whether there was allegation of contravention of Companies Act 1965 – Whether reliefs under s. 368A available*

STATUTORY INTERPRETATION: *Companies Act 1965 – Section 368A(1) and (4) – Whether properly construed by courts – Whether s. 368A(1) may only be invoked by Registrar or by person whose interests were either affected or would be affected by such conduct – Whether there must be allegation of contravention of Companies Act 1965 with specific provision identified – Whether reliefs under s. 368A available*

The respondents, who successfully petitioned to wind up Rasamutu Sdn Bhd ('Rasamutu') at the High Court, filed an application before the winding up court seeking several orders under s. 368A(1)(a) and (4) of the Companies Act 1965 ('the Act'). Those orders, in effect, serve to mandatorily order the appellant to deliver to the official receiver or any court appointed liquidator, the appellant's 208 subleases held over 208 freehold native titles together with his 208 native titles and other duplicate charges and duly executed discharge of charge over those 208 native titles. The High Court granted the respondents' application on the basis that since Rasamutu had been wound up and since it was still the registered sub-lessee of the 208 native titles which were kept by the appellant, and since the appellant had refused to hand over the titles, the application ought to be allowed so that the liquidator could do their jobs as required under the law expeditiously. Hence, this appeal. The issue that arose was whether the High Court had properly construed s. 368A of the Act.

Held (allowing appeal with costs)
Per Mary Lim JCA delivering the judgment of the court:

(1) Rasamutu was wound up pursuant to s. 218(1)(i) of the Act, that it was just and equitable to do so given the court's views on the tripartite arrangements in respect of the purchase and subleasing of the 208 native titles. However, that basis is entirely different from the power under

A s. 368A which the court was invited to invoke. It was incumbent on the trial judge to determine whether the application fell properly within the terms of s. 368A of the Act and not consider the application as if it was a continuation of the earlier application under s. 218 of the Act. The respondents' application was pursuant to s. 368A(1)(a) and (4) of the
B Act, which deals with a situation where a person is alleged either to have engaged or intended to engage in conduct that constituted, constitutes or would constitute a contravention of this Act. (paras 19 & 20)

(2) Section 368A(1) of the Act may only be invoked by the Registrar or by a person whose interests was either affected or would be affected by such
C conduct. It was therefore imperative that the respondents state how the conduct of the appellant affected their interests. It was not expressed in the application or in the affidavit filed in support of the application, any information as required under s. 368A(1)(a) or (4) of the Act. There was no averment as to what interests, if any, of the petitioners that were
D affected, and how such interests were affected. The notice of motion merely stated that the court was moved to hear the application of the petitioners made pursuant to s. 368A(1)(a) and (4) of the Act for the orders already alluded to earlier; while the affidavit explained that it was to compel the appellant to deliver to the official receiver or the court
E appointed liquidators the issue documents of title pertaining to the 208 native titles and subleases as registered in the appellant's name. (paras 21 & 22)

(3) There must be an express averment of how the petitioners' interests were affected by the conduct of the appellant, after the particular
F conduct of the appellant had been identified. The court should not be left to infer or worse, second guess. Further, the respondents were required to identify what or which specific provisions of the Act that the appellant was said to have contravened, for it is where there was contravention of this Act, that was, the Companies Act 1965, and not
G some other legislation, that the reliefs under s. 368A were available. This court did not see the Companies Act 1965 as a piece of composite or umbrella legislation under which all wrongs, offences or breaches were addressed and determined. It was apparent that the terms of s. 368A of the Act did not make that claim, and this court could not accede to any submission along those lines. (paras 24 & 25)

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(4) It was the contravention of ss. 17 and 64 of the Sabah Land Ordinance considered in the context of s. 24 of the Contracts Act 1950, which had led to the winding up of Rasamutu. And, in the winding up of Rasamutu, the court did not find that the provisions of the Act had been
I contravened. Neither did the petitioners allege there was any. Section 218 of the Act was only the enabling platform upon which any company may be wound up; it was not the provision upon which it was suggested that the tripartite agreement had been breached or offended. (para 26)

(5) The petitioners had alleged and relied on the contravention of the Sabah Land Ordinance as providing the just and equitable basis for winding up Rasamutu. And, the winding up court agreed. However, that basis for winding up Rasamutu was not and could not be a contravention of the Act. In the context of s. 368A(1)(a), there must be an allegation of contravention of the Act with the specific provision identified. Since there was none, the application ought to have been dismissed. (para 27)

(6) Since the winding up court had found the tripartite agreements to be void, the 208 native titles could not possibly form part of Rasamutu's assets. The titles were and had always been registered in the appellant's name. His status as a native was not in question or in doubt. Likewise, the non-native status of Rasamutu. The respondents/petitioners were therefore not entitled to utilise s. 368A of the Act for the purpose of wrenching those titles from the appellant. It would be inconsistent for the respondents, to have argued so vehemently for the winding up of Rasamutu on the basis that the tripartite agreements to be illegal and void under the Sabah Land Ordinance, and in the immediate next breath, to assert that the native titles and sublease belonged to Rasamutu and must be handed over to the liquidator. Parties could not be allowed to 'use the process of the courts to get the best of both worlds – to achieve his fraudulent purpose and also to get his property back.' For the purposes of s. 368A of the Act, that was far from being satisfactory and was not within its purview and permit. (paras 29, 32 & 33)

Bahasa Malaysia *Headnotes*

Responden-responden, yang telah berjaya dalam petisyen untuk menggulungkan Rasamutu Sdn Bhd ('Rasamutu') di Mahkamah Tinggi, memfailkan permohonan di hadapan mahkamah penggulungan menuntut beberapa perintah bawah s. 368A(1)(a) dan (4) Akta Syarikat 1965 ('Akta'). Perintah-perintah itu, sebenarnya, adalah perintah mandatori kepada perayu, untuk menyerahkan kepada pegawai penerima atau mana-mana pelikuidasi yang dilantik mahkamah, 208 sewaan hak milik perayu yang dipegang atas 208 hak milik-hak milik pegangan kekal anak negeri bersama-sama dengan 208 hak milik anak negerinya serta gadaian-gadaian salinan yang lain dan pelepasan gadaian meterai terhadap 208 hak milik-hak milik anak negeri itu. Mahkamah Tinggi membenarkan permohonan responden-responden atas dasar bahawa Rasamutu telah digulung dan oleh kerana ia masih didaftarkan sebagai penyewa hak milik untuk 208 hak milik-hak milik anak negeri yang dipegang perayu, dan oleh kerana perayu enggan menyerahkan hak milik-hak milik itu, permohonan harus dibenarkan supaya pelikuidasi boleh menjalankan tugas mereka seperti yang diperlukan oleh mahkamah dengan cepat dan cekap. Oleh itu, rayuan ini. Isu yang timbul adalah sama ada Mahkamah Tinggi telah mentafsirkan s. 368A Akta dengan betul.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Rasamutu telah digulung menurut s. 218(1) Akta, adalah adil dan saksama untuk berbuat demikian mengambil kira pandangan mahkamah berkenaan perjanjian tiga pihak berkenaan pembelian dan penyewaan 208 hak milik-hak milik anak negeri. Walau bagaimanapun, dasar itu adalah secara keseluruhan berbeza daripada kuasa bawah s. 368A yang perlu diguna pakai oleh mahkamah. Adalah wajib untuk hakim bicara menentukan sama ada permohonan terangkum dalam syarat-syarat s. 368A Akta dan tidak mengambil kira permohonan sebagai sambungan daripada permohonan sebelum ini bawah s. 218 Akta. Permohonan responden adalah menurut s. 368A(1)(a) dan (4) Akta, yang menangani situasi seseorang yang didakwa sama ada terlibat atau berniat untuk melibatkan diri secara kelakuan yang membentukkan, atau akan membentuk pelanggaran Akta ini.

(2) Seksyen 368A(1) Akta mungkin boleh digunakan oleh Pendaftar atau oleh seseorang yang kepentingannya telah terjejas atau akan terjejas oleh sesuatu kelakuan. Oleh itu, amat penting untuk responden-responden menyatakan bagaimana tindakan perayu telah menjejaskan kepentingan mereka. Tidak dinyatakan dalam permohonan atau dalam afidavit yang menyokong permohonan, apa-apa maklumat yang diperlukan bawah s. 368A(1)(a) atau (4) Akta. Tiada penjelasan berkenaan apakah kepentingan pempetisyen-pempetisyen, jika ada, yang terjejas, dan bagaimana kepentingan itu terjejas. Notis usul hanya menyatakan bahawa mahkamah diminta mendengar permohonan pempetisyen-pempetisyen yang dibuat menurut s. 368A(1)(a) dan (4) Akta untuk perintah-perintah yang sudah disebut sebelum ini; sementara afidavit memperjelaskan bahawa ia adalah untuk mewajibkan perayu menyerahkan kepada pegawai penerima atau likuidator yang dilantik mahkamah isu dokumen-dokumen hak milik-hak milik berkaitan dengan 208 hak milik-hak milik anak negeri dan sewaan yang didaftarkan atas nama perayu.

(3) Mesti ada penjelasan yang jelas bagaimana kepentingan pempetisyen-pempetisyen terjejas oleh perayu, selepas kelakuan tertentu perayu telah dikenal pasti. Mahkamah tidak sepatutnya dibiarkan untuk membuat inferens atau tekaan kedua. Tambahan, responden-responden diperlukan untuk mengenal pasti apa atau peruntukan spesifik Akta yang mana yang didakwa dilanggar oleh perayu, kerana ia adalah apabila terdapat pelanggaran terhadap Akta ini, iaitu Akta Syarikat 1965 dan bukan perundangan lain, yang relief-relief bawah s. 368A tersedia ada. Mahkamah ini tidak melihat Akta Syarikat 1965 sebagai satu komposit atau perundangan berpayung di mana segala kesilapan, kesalahan atau pelanggaran dialamatkan atau ditentukan. Agak ketara bahawa syarat-syarat s. 368A Akta tidak membuat permohonan itu, dan mahkamah ini tidak boleh menyetujui apa-apa hujahan sebegitu.

(4) Pelanggaran ss. 17 dan 64 Ordinan Tanah Sabah yang diambil kira dalam konteks s. 24 Akta Kontrak 1950 yang telah membawa kepada penggulungan Rasamutu. Dan, dalam penggulungan Rasamutu, mahkamah tidak mendapati peruntukan-peruntukan Akta telah dilanggar. Pempetisyen-pempetisyen juga tidak mendakwa apa-apa. Seksyen 218 Akta hanyalah platform yang membolehkan mana-mana syarikat digulungkan; ia bukanlah peruntukan yang dikatakan perjanjian tiga pihak telah dilanggar.

(5) Pempetisyen-pempetisyen telah mendakwa dan bergantung pada pelanggaran Ordinan Tanah Sabah sebagai dasar adil dan saksama untuk penggulungan Rasamutu. Dan, mahkamah penggulungan telah bersetuju. Walau bagaimanapun, dasar untuk peggulungan Rasamutu bukanlah pelanggaran Akta. Dalam konteks s. 368A(1)(a), harus terdapat dakwaan pelanggaran Akta dengan peruntukan spesifik dikenal pasti. Oleh kerana tiada yang tersebut, permohonan harus ditolak.

(6) Oleh kerana mahkamah penggulungan telah mendapati perjanjian tiga pihak tidak sah, 208 hak milik-hak milik anak negeri tidak boleh membentuk sebahagian aset-aset Rasamutu. Hak milik-hak milik sememangnya didaftarkan dalam nama perayu. Status perayu sebagai anak negeri tidak dipersoalkan atau diragukan. Begitu juga, status bukan anak negeri Rasamutu. Responden-responden/pempetisyen-pempetisyen oleh itu tidak berhak menggunakan s. 368A Akta untuk tujuan merenggut hak milik-hak milik itu daripada perayu. Tidak konsisten untuk responden-responden, untuk menghujahkan bersungguh-sungguh untuk Rasamutu digulungkan atas dasar bahawa perjanjian tiga pihak tidak mengikut undang-undang dan tidak sah bawah Ordinan Tanah Sabah, dan dalam nafas berikutnya, untuk menegaskan bahawa hak milik-hak milik anak negeri dan sewaan adalah milik Rasamutu dan harus diserahkan kepada likuidator. Pihak-pihak tidak dibenarkan 'menggunakan proses mahkamah untuk mendapatkan keistimewaan kedua-duanya – untuk mencapai tujuan palsunya dan juga untuk mendapatkan hartanahnya balik.' Untuk tujuan s. 368A Akta, itu jauh daripada memuaskan dan bukan dalam skop dan permitnya.

Case(s) referred to:

Chen Kong Theatres Sdn Bhd (In Liquidation) & Ors v. Lee Giok Tee & Anor [2018] 8 CLJ 10 CA ***(dist)***

Kiriri Cotton Co Ltd v. Dewani [1960] AC 192 ***(dist)***

Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors [2017] 9 CLJ 401 FC ***(dist)***

Palaniappa Chettiar v. Arunasalam Chettiar [1962] 1 LNS 115 PC ***(dist)***

Perbadanan Kemajuan Pertanian Selangor v. Megafores Nursery Sdn Bhd & Ors [2011] 8 CLJ 484 HC ***(dist)***

Puan Sri Datin Seri Grace Choong Foong Meng v. Michael Chia Hock Meng & Ors [2009] 1 LNS 163 HC ***(dist)***

Re Thomas Edward Brinmead & Sons Ltd [1897] 1 Ch 406 ***(dist)***

Sajan Singh v. Sardara Ali [1959] 1 LNS 90 PC ***(dist)***

Legislation referred to:
Companies Act 1965, ss. 218(1)(i), 305(1), 368A(1)(a), (4)
Contracts Act 1950, s. 24
Land Ordinance (Sabah) (Cap 68), ss. 17, 64
Rules of the Court of Appeal 1994, rr. 6, 18(7), (9)

For the appellants - Serena Liew Chun Yean; M/s Serena Liew & Assocs
For the respondents - Norbert Yapp; M/s Norbert Yapp & Assocs
For the liquidators - Catherine SP Chau; M/s Catherine Chau & Assocs

[Editor's note: For the High Court judgment, please see Seng Kim Huat & Anor v. Rasamutu Sdn Bhd & Ors [2018] 1 LNS 734 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Mary Lim JCA:

Introduction

[1] The respondents, who successfully petitioned to wind-up Rasamutu Sdn Bhd at the High Court at Sandakan on 6 June 2016, filed an application before the winding-up court seeking several orders under s. 368A(1)(a) and (4) of the Companies Act 1965. Those orders, in effect, serve to mandatorily order the appellant, to deliver to the official receiver or any court-appointed liquidator, the appellant's 208 subleases held over 208 freehold native titles together with his 208 native titles and other duplicate charges and duly executed discharge of charge over those 208 native titles.

[2] The order was allowed by the High Court. On appeal, we unanimously allowed the appeal after careful consideration of the submissions, the records of appeal and the applicable principles. These are our reasons in detail.

Relevant Background Facts

[3] *Vide* separate petitions, Rasamutu Sdn Bhd and Ria Realti Sdn Bhd were respectively wound-up on 15 April 2016 and 6 June 2016. In winding-up first, Ria Realti, the winding-up court held that "... the "just and equitable" ground to wind up a company is sufficiently wide enough to encompass a situation where the business of a company is carried on for an illegal purpose." The winding-up court followed the decision in *Perbadanan Kemajuan Pertanian Selangor v. Megafores Nursery Sdn Bhd & Ors* [2011] 8 CLJ 484 which had in turn applied *Re Thomas Edward Brinmead & Sons Ltd* [1897] 1 Ch 406.

[4] The petition to wind-up Ria Realti was on the basis that all the native titled lands purchased by the company and part-financed by Public Bank Berhad and registered in the name of Wong Kien Ching, were null and void because the purchases were designed to circumvent ss. 17 and 64 of the Sabah

Land Ordinance. After hearing evidence of one Seng Kim Huat who is in fact the first respondent in this appeal, and upon certain documentary evidence, the court concluded that "certain provisions of the Land Ordinance in particular ss. 17 and 64 may have been breached."

[5] According to the winding-up court, since the company "was no longer able to legally to [*sic*] carry out its main object ie, to run the Sugut Estate, its substratum was [*sic*] gone and any member may petition for a winding-up order on just and equitable ground. The fact that the majority of the shareholders may wish to keep the company in existence and exercise the powers to carry on either a similar business elsewhere or a different kind of business will not prevent the petitioners from petitioning for a winding-up order. This would be so even if the company's memorandum specifically provide that each of the objects should be a principal object, because the court must determine the real object for which the company was formed and would allow a winding-up petition if that object had for all interest and purpose has been tainted with illegality."

[6] For the same reasons, Rasamutu was wound-up, with the court referring to its decision to wind-up Ria Realti. The court found that the two companies had a common managing director, at least one common director and five common shareholders. Concurrent with the purchase of 2,723.71 acres of native titled lands by Ria Realti, Rasamutu bought 208 contiguous lots.

[7] *Vide* application in encl. 425, the petitioners sought the following orders:

(i) an injunction that the second respondent Wong Kien Ching do deliver to the official receiver or any court-appointed liquidator the 208 subleases over the 208 freehold native titles as particularised in the Schedule hereto within three days of the date of the order;

(ii) an injunction that the second respondent Wong Kien Ching do deliver to the official receiver or any court-appointed liquidator the issue documents of title over the 208 freehold native titles as particularised in the Schedule hereto within three days of the date of this order;

(iii) an injunction that the second respondent Wong Kien Ching do deliver to the official receiver or any court appointed liquidator the duplicate charges and the duly executed charges and the duly executed discharge of charge over the 208 subleases and the 208 freehold native titles as particularised in the Schedule hereto within three days of the date of this order;

(iv) costs of this application be paid to the petitioners by the second respondent Wong Kien Ching.

[8] It is the grant of these orders that is the subject matter in the present appeal.

[9] At the hearing of this appeal, learned counsel for the liquidators urged this court to dismiss the appeal on the ground that the appeal was incompetent under rr. 6, 18(7) and 18(9) of the Rules of the Court of Appeal 1994. The liquidators, being an interested party had not been served with the notice of appeal. At the proceedings before the High Court, it had filed two affidavits in support of the application under s. 368A. The decision of this court in *Chen Kong Theatres Sdn Bhd (In Liquidation) & Ors v. Lee Giok Tee & Anor* [2018] 8 CLJ 10 (Civil Appeal No: W-02(NCC)(A)-2319-12-2016) was cited in support.

[10] We declined. We found the underlying circumstances in the present appeal of much contrast to those in Chen Kong Theatres. There, the appeal was against the order to wind-up *Chen Kong Theatres*. The notice of appeal was not served on the liquidator, a party who was directly affected by the appeal while the record of appeal was served late. There was also no application for extension or abridgment of time for service of either the notice or the record of appeal. On that basis, the court could not deal with the irregularity complained of and consequently allowed the respondent's application to strike out the appeal.

[11] In the instant appeal, there is no similar application moved by any of the respondents, including the liquidators. The appeal further is in respect of an order moved by the petitioners, to which the liquidators chose to associate themselves with and support. For the purpose of r. 6 of the Court of Appeal Rules 1994, it is the respondents who are the parties who are directly affected by the appeal; the liquidators, are indirect parties so affected. We say, for the purposes of r. 6, as the intent of the liquidators' complaint is to move this court to strike out the appeal *in limine*, without the liquidators having taken any effort. This is quite unlike the circumstances in *Chen Kong Theatres* where the court was moved to strike out the appeal on the application of the liquidator. The far-reaching effect of the liquidators' arguments must be carefully weighed when considering whether to accede to its preliminary objection.

[12] Moving then to the substantive issues in this appeal, and that is the question of whether the High Court had properly construed s. 368A of the Companies Act 1965. With respect, we answer that poser in the negative.

[13] The court was moved under s. 368A(1)(a) and (4) of the Companies Act 1965 which reads as follows:

> (1) **Where a person has engaged, is engaging or intends to engage in conduct that constituted, constitutes or would constitute**:
>
> (a) **a contravention of this Act**;
>
> (b) an attempt to contravene this Act;

(c) an attempt that aids, abets, advises or procures a person to contravene this Act;

(d) an attempt to induce, whether by threats, promises or otherwise, a person to contravene this Act;

(e) an attempt by which any person would be in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or

(f) an attempt of conspiracy with others to contravene this Act,

the Court may, on application of the Registrar or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the court it is desirable to do so, requiring that person to do any act or thing.

(2) Where a person has refused or failed, is refusing or failing, or is intending to refuse or fail, to do an act or thing that the person is required by this Act to do, the Court may, on the application of the Registrar or any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing, grant an injunction, on such terms as the Court thinks appropriate, requiring the first-mentioned person to do that act or thing.

(3) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised whether or not:

(a) it appears to the Court that the person intends to engage again or continue to engage, in conduct of that kind;

(b) the person has previously engaged in conduct of that kind; or

(c) there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(4) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised whether or not:

(a) it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;

(b) the person has previously refused or failed to do that act or thing; or

(c) there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.

(5) Where the Registrar ...

(6) Where an application for an injunction under subsection (1) or (2) has been made, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all parties to the proceedings, whether or not the Court is satisfied that that subsection applies.

(7) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

A (8) The Court may revoke or vary an injunction granted under subsection (1), (2) or (7).

(9) In granting an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the
B injunction, order that person to pay damages to any other person.

[14] We do not see the learned judge addressing s. 368A in any degree anywhere in his grounds of decision. Instead, what we found was this - after identifying the appellant/second respondent's submission at para. 6 of the grounds, the learned judge proceeded to accept the petitioners/respondents'
C submissions of what had transpired at the earlier winding-up proceedings, where the winding-up judge "did not set aside the VOID titles. The subleases and freehold titles registered in Rasamutu Sdn Bhd's name and Wong Kien Ching's name respectively were LIABLE to be set aside, but were not set aside/cancelled by the learned judge. His Lordship left it to another forum
D to deal with the consequence of void title."

[15] At para. [7], the learned judge noted that when the winding-up court:

> ... ordered the winding up of Ria Realti, he said: "Having read the submission by Pearl Lee counsel for the Public Bank Berhad particularly on Section 221 of the Companies Act and the cited authorities, I shall not
E deal with the consequential orders sought for but instead confine myself to the issue of illegality *vis-a-vis* contravention of Section 17 and Section 64 of the Land Ordinance and the effect of Section 24 Contract Act ..."

[16] The learned judge turned next to the case authorities that were cited to him. Upon examination, His Lordship found them not to be of any
F assistance as the cases such as the Federal Court's decision in *Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors* [2017] 9 CLJ 401 did not deal "with illegality as a basis to wind up a company where the winding up court under s. 221 could not order any consequential orders to void the transfer of the said 208 native titles to the second respondent or the subleases
G registered with Rasamutu or the banking charges. The petitioners submitted "The fate of the estate lands and the documentary titles pertaining to them have to be determined in another forum." His Lordship added that he was "also of the view that any interested parties are at liberty to file an action to declare void all those dealings involving the 208 native titles. But none
H has done so far." And, because Rasamutu had been wound-up and liquidators have been appointed and "Rasamutu is still the registered sublessee of the 208 native titles and all these titles are kept by the second respondent and since he refused to hand over the same to the liquidators, such application ought to be allowed so that the liquidators could do their jobs as required under the law expeditiously. The liquidators also supported this
I application."

[17] The learned judge granted the respondents' application, encl. 425 on the basis that since Rasamutu had been wound-up and since it is still the registered sublessee of the 208 native titles which are kept by the appellant, and since the appellant has refused to hand over the titles, the application "ought to be allowed so that the liquidator could do their jobs as required under the law expeditiously."

[18] From para. [8] of the judgment, it is further quite apparent that the learned judge saw the application in encl. 425 as one seeking for consequential orders, that the application was now properly before "another forum", and that it ought to be granted "so that the liquidator can do his job."

[19] With respect, we cannot agree with the learned judge. Rasamutu was wound-up pursuant to s. 218(1)(i) of the Companies Act 1965, that it was just and equitable to do so given the court's views on the tripartite arrangements in respect of the purchase and subleasing of the 208 native titles. However, that basis is entirely different from the power under s. 368A which the court was invited to invoke. It was incumbent on the learned judge to determine whether the application fell properly within the terms of s. 368A and not, consider the application as if it was a continuation of the earlier application under s. 218.

[20] As was pointed out earlier, the respondents' application is pursuant to s. 368A(1)(a) and (4). Section 368A(1)(a) deals with a situation where a person is alleged either to have engaged or intends to engage in conduct that constituted, constitutes or would constitute a contravention of this Act. In such a situation, the court is moved to grant an injunction requiring that person to do a particular act or thing.

[21] What is important is that s. 368A(1) may only be invoked by the Registrar or by a person whose interests is either affected or would be affected by such conduct. It is therefore imperative that the applicants who are the respondents in this appeal, state how the conduct of the respondent to the application, that is, the appellant, affect their interests. Where and when that element has been established, the court is then in the position to impose such terms as are appropriate when granting the relevant injunction.

[22] It is not expressed in encl. 425 or in the affidavit filed in support of the application, any information as required under s. 368A(1)(a) or (4). There is no averment as to what interests, if any, of the petitioners are affected, and how such interests are affected. The notice of motion merely states that the court is moved to hear the application of the petitioners made pursuant to s. 368A(1)(a) and (4) of the Companies Act 1965 for the orders already alluded to earlier; while the affidavit explains that it is to compel the appellant to deliver to the official receiver or the court appointed liquidators the issue documents of title pertaining to the 208 native titles and subleases as registered in the appellant's name. A schedule containing the details of the 208 native titles are attached.

[23] According to the petitioners, by a letter dated 9 June 2016 (exh. SKH3), the then liquidator of Rasamutu had requested the appellant to hand over "the original land titles for 244 titles of land for the Sugut Estate together with supporting and ancillary papers and documents such as lease agreements and/or relevant documents." This was refused *vide* appellant's solicitors' letter dated 15 June 2016. The petitioners claimed that the documents sought pertain to "the very important and valuable assets" of the first respondent company, Rasamutu.

[24] Although the first petitioner who affirmed the affidavit for both petitioners had identified himself as "also a contributory and creditor of the first respondent company", we are of the view that that is insufficient. There must be an express averment of how the petitioners' interests are affected by the conduct of the appellant, after the particular conduct of the appellant has been identified. The court should not be left to infer or worse, second guess.

[25] Further, the respondents are required to identify what or which specific provisions of the Companies Act 1965 that the appellant is said to have contravened, for it is where there is contravention of this Act, that is, the Companies Act 1965 and not some other legislation, that the reliefs under s. 368A are available. See *Puan Sri Datin Seri Grace Choong Foong Meng v. Michael Chia Hock Meng & Ors* [2009] 1 LNS 163. We do not see the Companies Act 1965 as a piece of composite or umbrella legislation under which all wrongs, offences or breaches are addressed and determined. It is apparent that the terms of s. 368A do not make that claim, and we cannot accede to any submission along those lines.

[26] From the affidavits filed, and as understood and accepted by the learned judge, it was the contravention of ss. 17 and 64 of the Land Ordinance considered in the context of s. 24 of the Contracts Act 1950, which had led to the winding-up of Rasamutu. And, in the winding-up of Rasamutu, the court did not find that the provisions of the Companies Act had been contravened. Neither did the petitioners allege there was any. Section 218 of the Companies Act 1965 was only the enabling platform upon which any company may be wound-up; it was not the provision upon which it was suggested that the tripartite agreement had been breached or offended.

[27] The petitioners had alleged and relied on the contravention of the Land Ordinance as providing the just and equitable basis for winding-up Rasamutu. And, the winding-up court agreed. However, that basis for winding-up Rasamutu is not and cannot be a contravention of the Companies Act 1965. In the context of s. 368A(1)(a), there must be an allegation of contravention of the Companies Act 1965 with the specific provision identified. Since there is none, the application ought to have been dismissed.

[28] The appellant had in any case, averred that he had duly submitted all the relevant forms, that is, Form 61 and Form 62 of the Companies Act 1965 with the official receiver and/or liquidator and had already provided all relevant information to the same. This is borne out by the subsequent application of the respondents who initiated encl. 540. Therefore, for the purposes of s. 368A, there cannot be any contravention of any provisions of the Companies Act 1965.

[29] We further agree with the submissions of the appellant that since the winding-up court had found the tripartite agreements to be void, the 208 native titles cannot possibly form part of Rasamutu's assets. The titles are and have always been registered in the appellant's name. His status as a native is not in question or in doubt. Likewise, the non-native status of Rasamutu. The respondents/petitioners are therefore not entitled to utilise s. 368A for the purpose of wrenching those titles from the appellant.

[30] In fact, we understand that prior to the application in encl. 425, the petitioners/respondents had applied under s. 305(1) of the Companies Act 1965 for an order to amend and/or rectify the statement of affairs (Form 61 and Form 62) to include the 208 native titles as assets of Rasamutu (encl. 540), and this goes back to the point we made earlier about there being no contravention or allegation of any contravention of "this Act" under s. 368A. In dismissing that application with costs, the High Court there had ruled that:

> The learned High Court Judge Datuk Douglas Primus ruled that the tripartite SPA of the remaining unexpired lease for the 208 Native Titles to be illegal. There is no appeal against the said finding on illegality. As such this Court cannot order the 208 Native Titles and the subleases of the 208 Native Titles as the assets of the 1st respondent company (Rasamutu Sdn Bhd). To do so, it would amount to sanctioning the contravention of the Sabah Land Ordinance. It would be against public policy if this Court is to enforce or grant any remedy under an illegal contract.

[31] There was no appeal against that decision. In our view, what stands obvious from these decisions is that the winding-up court saw it just and equitable to wind-up Rasamutu for the reasons proffered by the respondents, and that the 208 native titles and related subleases were not assets of Rasamutu. With the latter order of the court which is clearly not in the respondents' favour, we cannot see how the respondents can now indirectly secure for Rasamutu what had been directly and expressly ruled otherwise. It certainly is not within the purview of the winding-up court to grant the orders sought by the respondents. For sure, it cannot be made pursuant to s. 368A and treated as it was by the learned judge, as almost an application for some consequential or unfinished orders from its earlier decision when winding-up Rasamutu. Separate substantive action may have to be instituted as indicated by the first winding-up court; but it is not for this court to

A speculate or even provide any directions on the details or efficacy of such action. The fact that the liquidators supported the respondents in their application does not alter our findings and views.

[32] It is in such action, if taken, that the ownership of the 208 native titles may be fully addressed and determined. We however, are prepared to agree B with the appellant that it would be inconsistent for the respondents, to have argued so vehemently for the winding-up of Rasamutu on the basis that the tripartite agreements to be illegal and void under the Sabah Land Ordinance, and in the immediate next breath, to assert that the native titles and subleases belong to Rasamutu and must be handed over to the liquidator. As opined C by Lord Denning in *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115, parties cannot be allowed to "use the process of the courts to get the best of both worlds - to achieve his fraudulent purpose and also to get his property back. The courts will say: "Let the estate lie where it falls," see *Sajan Singh v. Sardara Ali* [1959] 1 LNS 90 and *Kiriri Cotton Co Ltd* D *v. Dewani* [1960] AC 192 at pp. 202-3."

[33] For the purposes of s. 368A, that is far from being satisfactory and is not within its purview and permit. The learned judge was consequently plainly erroneous in law and on the facts to have acceded to the respondents' application.

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[34] For all the above reasons, this court is compelled to allow the appeal with costs.

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